No. 17-1705

IN THE

Supreme Court of the United States

PDR NETWORK, LLC, *ET AL.*,
Petitioners,

v.

CARLTON & HARRIS CHIROPRACTIC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR STATE AND LOCAL GOVERNMENT ASSOCIATIONS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[*]

Amici, state and local government associations, respectfully submit this *amici curiae* brief in support of Petitioners.[1]

Amici have a strong interest in informing the Court of the significant, adverse, and unwarranted consequences that the Nation's state and local governments suffer as a result of affording blind deference to federal agencies' interpretations of congressionally enacted statutes. According complete deference requires the judiciary to abdicate its constitutional duties and creates serious separation of power problems. That blind deference detrimentally affects state and local governments by disrupting state and local legal regimes and imposing a significant strain on limited state and municipal resources.

Maintaining the status quo and preserving district courts' ability to perform the standard *Chevron* analysis will help avoid more serious constitutional questions and ensure that state and local governments retain the ability to defend themselves from questionable agency interpretations. This, in turn, will minimize disruption to state and local regimes, and avoid—or at least limit—the risk to federalism posed by federal agencies' ever-expanding authority.

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[*] The parties have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici* represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

[1] A full list of the signatories to this brief and more detailed information about individual *amici* is provided in the Appendix.

SUMMARY OF ARGUMENT

Within the scope of its application, the Hobbs Act, as construed by the court of appeals, does not simply defer to agency constructions of ambiguous statutes, as is the practice under *Chevron, U.S.A.* v. *Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984). Instead, it applies an even more deferential approach under which district courts may not even consider unambiguous statutory language if the agency has spoken to the issue before the court. Even where, as here, the district court concluded that the statute unambiguously required that Petitioners prevail, the ruling of the court of appeals dictates that the district court lacks the power to apply that unambiguous statute.

This approach is contrary to the language and intent of the Hobbs Act and would raise serious separation-of-powers and due process questions. Congress directed only that the courts of appeals would have exclusive jurisdiction to "enjoin, set aside, suspend * * * or determine the validity of" an agency action, not that a district court could not even apply a statute directly to the facts before it without first applying the agency's order. Congress's regulation, through the Hobbs Act, of direct challenges to the adoption of an agency final order was not intended to, and did not, prevent district courts from deciding the validity of any statutory claim that even touches on an agency order. The construction of the Hobbs Act by the court of appeals would work an unprecedented transfer of judicial and legislative power to agencies, which would be free to construe federal law without any opportunity for judicial review.

The approach of the court of appeals would cause serious harm to state and local governments. It would require those governments to anticipate and challenge possible future unlawful applications of an agency order when they were still theoretical or lose the chance to do so forever. Nothing in the Hobbs Act requires this heavy burden to be placed on state and local governments. The judgment of the court of appeals should be reversed.

ARGUMENT

I. THE HOBBS ACT DID NOT DEPRIVE THE DISTRICT COURT OF JURISDICTION TO ADJUDICATE PETITIONERS' STATUTORY ARGUMENTS.

A. The Hobbs Act's Restrictions on District Court Actions Are Narrow.

1. As Petitioners recount (at 6–7), Congress passed the Administrative Orders Review Act (the Hobbs Act) in 1950 to channel certain challenges to agency action directly to the courts of appeals. The Hobbs Act confers on the courts of appeals "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain actions performed by the covered agencies. 28 U.S.C. § 2342 *et seq.* These agencies include the Federal Communications Commission, the Atomic Energy Commission, the Federal Maritime Commission, and others. *Ibid.*

The plain language of the Hobbs Act thus reaches only direct challenges to the agency action itself: requests to enjoin it, set it aside, suspend it, or invalidate it. By channeling such direct challenges into

the courts of appeals, Congress intended the Hobbs Act to help administrative agencies act more efficiently. The House Report explained that "submission of the cases upon the records made before the administrative agencies will avoid the making of two records, one before the agency and one before the court on review, and thus going over the same ground twice." H.R. Rep. No. 2122, at 3–4 (1950). See also S. Rep. No. 2618, at 4–5 (1950) ("The proposed method of review has important advantages of simplicity and expedition * * * in the disposition of a considerable class of business of the Federal courts.").

Courts, by and large, have embraced that rationale. This Court has observed that "[o]ne purpose of the Hobbs Act was to avoid the duplication of effort involved in creation of a separate record before the agency and before the district court." See, *e.g.*, *Fla. Power & Light Co.* v. *Lorion*, 470 U.S. 729, 740 (1985). Direct review in the courts of appeals has the "most obvious advantage" of saving time "compared to review by a district court, followed by a second review on appeal." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 593 (1980).

This efficiency rationale is consistent with Petitioners' construction of the Hobbs Act as reaching "just one kind of proceeding: suits against the United States brought to obtain injunctive or declaratory relief from agency action." Petr. Br. at 2. In "proceedings for *direct* review, in which a party seeks injunctive or declaratory relief against the United States from an allegedly unlawful agency action," Petr. Br. at 13, the Hobbs Act promotes efficiency by channel-

ing requests for review of the agency's decision directly to the courts of appeals.

In contrast, where, as here, a private plaintiff asserts that defendants have violated a federal law as construed by an agency, the plaintiff's claim and the defendants' defense have not been litigated in front of the agency—or anywhere at all. To eliminate the defendants' ability to argue that the statute does not prohibit their conduct would not reflect efficient adjudication of a defense, but straightforward deprivation of the right to advance the defense at all.

It is thus no surprise that the overwhelming majority of early Hobbs Act cases focused on direct challenges to agency actions—precisely what the Act was written to address. See, *e.g.*, *Isbrandtsen Co.* v. *United States*, 211 F.2d 51 (D.C. Cir. 1954); *Consolo* v. *Fed. Mar. Comm'n*, 383 U.S. 607 (1966); *Nat. Res. Def. Council* v. *U.S. Nuclear Regulatory Comm'n*, 606 F.2d 1261 (D.C. Cir. 1979). In *Consolo*, for example, the appellant filed a "direct appeal from the Commission's reparation order granting only part of the relief requested." 383 U.S. at 613. These cases consistently involved an agency as party, not a private dispute to which an agency regulation was purportedly relevant.

2. Other provisions of the Hobbs Act are consistent with this view of the Act as a means to promptly and efficiently adjudicate direct challenges to agency action. The Act provides that challenges to certain agencies' actions must be brought within 60 days after the entry of a final order. 28 U.S.C. § 2344. That deadline is workable for direct challenges that seek to invalidate the order itself; indeed,

it is consistent with the deadline for a notice of appeal in cases that, like a direct challenge to an agency decision, involve the United States. Fed. R. App. P. 4(a). But a deadline following closely after the order is entered—long before the application of the order to potential future facts is made or necessarily even contemplated—is untenable where the order has not been applied to any particular facts at all. Once the 60-day deadline lapses, a potential challenger must petition the agency to promulgate a new order or rule. If the agency denies that petition, the challenger may subsequently seek review of that denial in the courts of appeals. See, *e.g.*, *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 465–66 (1984).

The D.C. Circuit has commented that "[t]his time limit, like other similar limitations, serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations." *Nat. Res. Def. Council* v. *Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). But the courts cannot—and it would not be efficient to—finally adjudicate every possible application of an agency order to future, unknown facts to determine whether the agency order could ever be (or become) inconsistent with the terms of the statute.

The construction of the Hobbs Act as one limited to direct challenges to agency action is further supported by the requirement that parties seeking review of agency action be "aggrieved by" the order and, therefore, have "be[en] parties to any proceedings before the agency preliminary to issuance of its order." See Petr. Br. at 15 (quoting 28 U.S.C. § 2344

and *Simmons* v. *ICC*, 716 F.2d 40, 42 (D.C. Cir. 1983)). A party who seeks to enjoin the agency action itself may reasonably be expected to participate in proceedings before the agency relating to that order. But it promotes *inefficiency* to expect parties like Petitioners here, who do not challenge the agency action itself but disagree with a particular application of that action, to have participated in the agency's original action and then appealed that action to seek the court's resolution of a future, hypothetical construction that an opposing litigant could make of the agency order.

In short, the Hobbs Act, if read to reach attempts to obtain injunctive or declaratory relief against the United States from an agency order, properly serves the efficiency goals for which it was enacted. But if expanded beyond its plain language to include suits that do not merely seek injunctive or declaratory relief against the United States, the Hobbs Act would embroil the courts in hypothetical disputes by requiring parties to raise in the courts of appeals at the time the order was issued all hypothetical challenges to the way the agency order could be applied to particular facts.

B. The District Court's Construction of the Telephone Consumer Protection Act ("TCPA") Did Not Run Afoul of the Hobbs Act.

1. Consistent with the Hobbs Act, "[n]either party in this case has challenged the validity of the FCC's interpretation of the TCPA." *Carlton & Harris Chiropractic, Inc.* v. *PDR Network, LLC*, 2016 WL 5799301, at *3 (S.D. W. Va. Sept. 30, 2016). Nor did

any party ask the district court to "enjoin, set aside, [or] suspend" that interpretation. *Ibid.*

In this particular case, instead of seeking to *invalidate* the 2006 Order,[2] both parties argued that the Order *supported* their position. See *Carlton & Harris*, 2016 WL 5799301, at *4 ("[E]ven if the Court were to defer to the FCC's interpretation, a careful reading of the section cited by Plaintiff further supports this Court's decision."). Far from invalidating the 2006 Order, the district court concluded that it "support[ed]" his decision—yet the court of appeals found that he lacked jurisdiction to apply the statute. See *Carlton & Harris Chiropractic, Inc.* v. *PDR Network, LLC*, 883 F.3d 459, 464 (4th Cir. 2018).

While the district court's affirmative conclusion that the agency order *supported* his decision highlights the error in concluding that he impermissibly *invalidated* that order, the case does not turn on that point. The key aspect of the analysis is that the content of the Order was not necessary to the outcome of the case in the district court. The issue of Petitioners' liability instead turns on the meaning of the *statute*. Thus, the district court properly determined that the issue could be decided on the basis of the statute's text, without any consideration of the ap-

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[2] The "2006 Order" is described in more detail in Petitioners' Brief at 5. The portion of the order that the Fourth Circuit deemed controlling provides that "unsolicited facsimile messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." See *Report and Order and Third Order on Reconsideration: Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 21 FCC Rcd. 3787, 3184 (2006).

plicability of the Order. Whether the Order is valid or invalid, applicable or inapplicable, was not a necessary question for the district court to resolve to ascertain whether Petitioners violated the TCPA.

2. The contrary conclusion of the court of appeals turns the usual *Chevron* approach to determining how much weight to give an agency pronouncement on its head. Under *Chevron*, whether Congress "has directly spoken to the precise question at issue" in its statute is the threshold question. *Chevron*, 467 U.S. at 842. If "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43. Because a finding that the statute is unambiguous ends the matter, a court that, like the district court here, finds the statute unambiguous makes no statement about the agency action *at all*. That is, the conclusion that the TCPA unambiguously does not apply to Petitioners' fax means that the TCPA claim fails. That holding does not require adjudicating whether the 2006 Order would lead to the same result or, if not, whether that makes the Order invalid in whole or in part.

As a result, a district court's analysis, after construction of an unambiguous statute, of whether the agency action would lead to the same result is unnecessary and, if included, unbinding *dicta*. It does not in any way affect the validity of the agency action in future cases.

The analysis of the court of appeals flips the *Chevron* approach. Rather than limiting consideration of agency action to circumstances in which the

statute is ambiguous, the court of appeals effectively prohibits consideration of the *statute* as law independent of the agency's construction of it. The court of appeals reasoned that the district court was "precluded * * * from even reaching the [*Chevron*] step-one question." *Carlton & Harris*, 883 F.3d at 464. Instead of reaching the question that this Court has held comes *first*, the court of appeals held that the district court must consider whether *the agency* has spoken to the issue in the case. If it has, then, in effect the court of appeals decision means that the application of the agency order "is the end of the matter" (see *Chevron*, 467 U.S. at 842), because the district court may not, under the view of the court of appeals, decline to follow the agency's construction. It is only, presumably, if the agency "has not directly addressed the precise question at issue" (*id.* at 843) that the court of appeals would permit a district court to consult the statutory command at all.

This Court has never construed the Hobbs Act to work such a sweeping change, nor should it here. As then-Justice Rehnquist remarked in a case raising similar issues, "I think it is difficult to believe that Congress would adopt a massive shift in jurisdiction from the district courts to the courts of appeals without any comment whatsoever." *PPG Indus.*, 446 U.S. at 600 (Rehnquist, J., dissenting). Here, the posited shift is even more massive; the court of appeals posits that Congress has shifted district court jurisdiction to construe statutes *entirely* to the agency. TCPA provides no hint Congress intended such a perverse result.

3. The court of appeals based its conclusion that the Hobbs Act prevented the district court from con-

struing the statute directly on its view that there was only a "'fine distinction'" between invalidating a rule and simply not applying it, and that both options are proscribed by the Hobbs Act. *Carlton & Harris*, 883 F.3d at 465. But the court ignored the key distinction that the Act *only prohibits* actions that "enjoin, set aside, suspend (in whole or in part), or * * * determine the validity of" the agency action. 28 U.S.C. § 2342. Nothing in the Hobbs Act purports to prohibit district courts from finding it unnecessary to consult a rule to decide the case.

Moreover, there is a *vast* distinction between invalidating the action of a federal agency and simply not opining on it. Had the district court ended its opinion with the conclusion that "the single fax at issue here is not an 'advertisement' as defined by the TCPA," its ruling would have had no necessary effect on the 2006 Order. *Carlton & Harris*, 2016 WL 5799301, at *3. The district court's conclusion that it need not consult the 2006 Order in light of the clarity of the statute simply says nothing about whether the 2006 Order is valid, in this or any other case.

II. Constitutional Avoidance Counsels Against Construing the Hobbs Act to Require Blind Deference.

Petitioners' construction of the Hobbs Act is also compelled by the canon of constitutional avoidance. Respondent's proposed prioritization of agency pronouncements over duly enacted law and the authoritative construction of the judiciary would do serious damage to fundamental separation-of-powers and due process principles.

1. "Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others." *Bond* v. *United States*, 564 U.S. 211, 222 (2011). The Constitution confers on Congress the authority to *enact* the law (signed by the President) and on the judiciary the authority to *interpret* it. Under the Hobbs Act as construed by the court of appeals, the FCC had the authority to announce *whatever it wanted* as the meaning of the TCPA, and the judiciary is bound by that interpretation even if it is directly contrary to the statute adopted by Congress. That is, Congress may have *enacted* a statute, and an independent judiciary may, if given the opportunity, have *interpreted* it in Petitioners' favor. However, the court of appeals would give the agency the authority to force a different outcome than the statute—as enacted by Congress and interpreted by the court—actually mandates.

This transfer of power to the agencies is anomalous even in a field of ever-burgeoning agency power. The Senate Judiciary Committee has observed that "'[v]ery rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified.'" *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 671 (1986) (quoting S. Rep. No. 752, at 26 (1945)). Thus, "[i]f a provision can reasonably be read to permit judicial review, it should be," *Cuozzo Speed Techs., LLC* v. *Lee*, 136 S. Ct. 2131, 2150 (2016) (Alito, J., concurring in part and dissenting in part)—especially where one interpretation raises "'a serious doubt'" about an act of Congress. *Jennings* v. *Rodriguez*, 138

S. Ct. 830, 842 (2018) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)). See also *Benson*, 285 U.S. at 62 ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."). And "[i]t is against this background that [the Court should] consider whether the authority of administrative agencies should be augmented even further, to include" the power to defeat judicial review without the judiciary engaging in any sort of review at all. *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, J., dissenting).

The elimination of judicial review in this context is particularly striking given that the court of appeals' construction of the Hobbs Act would allow Congress to hand off the legislative power while simultaneously restricting the judicial power. This would remove the possibility of any real check on the agencies covered by the Act—or any other agencies Congress may extend it to in the future. *Mistretta* v. *United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) ("[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power."). There can be no more serious affront to the principle of separation of powers than such blind submission. *City of Arlington*, 569 U.S. at 315 (Roberts, J., dissenting) ("It would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed."); The Federalist No. 47 at 301 (J. Madison) (C. Rossiter ed., 1961) ("[A]ccumulation of all powers, legislative, executive, and judiciary, in the same hands, * * *

may justly be pronounced the very definition of tyranny."); Montesquieu, *Spirit of the Laws* bk. XI, ch. 6, p. 152 (O. Piest ed., T. Nugent trans. 1949) ("There would be an end of everything were the same man, or the same body * * * to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.").

While *Chevron* is appropriately criticized for giving "core judicial and legislative powers" to unelected agencies,[3] the construction of the Hobbs Act advanced by the court of appeals goes much further. Step one of *Chevron* maintains the primacy of the *legislation*, at least where it is ambiguous. See *Michigan* v. *E.P.A.*, 135 S. Ct. 2699, 2707 (2015) (internal citations and quotation marks omitted) ("*Chevron* directs courts to accept an agency's reasonable resolution of an ambiguity in a statute that the agency administers. Even under this deferential standard, however, agencies must operate within the bounds of reasonable interpretation."). Conversely, the Hobbs Act, as interpreted by the court of appeals, maintains

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[3] "*Chevron* * * * permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power * * * in a way that seems more than a little difficult to square with the Constitution." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). As has been noted ad nauseum in both legal literature and judicial opinions, *Chevron* raises important questions about the power of the modern executive. See, *e.g.*, *Michigan* v. *E.P.A.*, 135 S. Ct. 2699, 2712 (2015) (Thomas, J., concurring) (explaining there are "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes"). It is nothing "less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

the primacy of the *agency action*, as set forth above. But see *Gutierrez-Brizuela*, 834 F.3d at 1150) (Gorsuch, J., concurring) ("[The] separation of functions aimed to ensure a neutral decisionmaker * * * faces more than a little pressure [when] * * * courts are required to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies.").

In our carefully crafted three-branch system, the Legislature may not abdicate its power to a subordinate of the second branch *and simultaneously* strip the third branch of its power as well. *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1217 (2015) (Thomas, J., concurring in judgment) ("[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws."); *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). Yet that is what the Hobbs Act, as construed by the court of appeals, purports to do. The Act can and should be read to avoid that construction, which at a minimum creates serious separation-of-powers concerns.

2. The court of appeals' construction of the Hobbs Act would also raise serious due process concerns. Petitioners' Br. 40–41. A party would have to anticipate at the time an agency action was taken whether that agency action could ever be applied in a way that brought it into conflict with the governing statute. Here, Petitioners contended the 2006 Order did not reach their conduct. In order to have meaningfully challenged that order, Petitioners would have had to anticipate that they would want to send

the faxes at issue, and that, in that circumstance, the 2006 Order would be misapplied to reach those faxes. But Petitioners could not challenge that application because they had no notice the 2006 Order would be applied in that way. And now that Petitioners do have such notice, the court of appeals would deny them any meaningful opportunity to defend themselves from the 2006 Order's application. To hold Petitioners liable for conduct that does not violate the statute, without providing any opportunity to prove it does not violate the statute, offends basic norms of due process.

III. Requiring District Courts to Defer Under the Hobbs Act Imposes Serious Costs on State and Local Governments.

1. State and local governments face particular risks from the construction of the Hobbs Act advanced by the court of appeals. In recent months, the Nation has witnessed high-profile conflicts between agencies whose orders are shielded by the Hobbs Act and state and local governments. For example, in the realm of internet regulation, the FCC has been "on a march to smother local authority by blocking states from regulating any aspect of broadband service, supporting states that have raised barriers to municipal networks, deregulating pricing for lines running between cities, and removing local control over rights-of-way that could be used to bring cheaper access into town." Susan Crawford, *Cities Are Teaming Up to Offer Broadband, and the FCC Is Mad*, Wired (Sept. 27, 2018), http://goo.gl/2v2jR3. And as 5G wireless phone technology has become available, "[d]espite efforts by local and state governments, including scores of commenters in the

agency's docket, the Commission has embarked on an unprecedented federal intrusion into local (and state) government property rights that will have substantial and continuing adverse impacts on cities and their taxpayers, including reduced funding for essential local government services, and needlessly introduce increased risk of right-of-way and other public safety hazards." Tom Cochran, *Statement by U.S. Conference of Mayors CEO & Executive Director Tom Cochran on FCC's Order Subordinating Local Property Rights*, U.S. Conference of Mayors (Sept. 26, 2018), http://goo.gl/XZKLkx.

The FCC regularly dictates to cities where and how telecommunications equipment may and may not be installed. In practice, this has meant allowing service providers to construct "hundreds of thousands of small [cell] stations * * * an average of a few hundred feet apart, on streetlights, utility poles and other structures." Tiffany Hsu, *F.C.C. Puts 5G Rollout Rules in Federal Hands*, N.Y. Times (Sept. 26, 2018), http://goo.gl/brt2UF. This project has sparked widespread chaos as localities struggle to manage their physical space and municipal resources in the shadow of top-down dictates.

And these are only the highest-profile cases: In countless other ways, large and small, the actions of the FCC and other agencies impose burdens on state and local governments. Given the sheer volume of agency regulatory output, it is effectively impossible for any state or local government to stay abreast of every coming directive.

If any locality chooses to challenge those burdens in court, the Hobbs Act is restrictive enough: locali-

ties that missed their initial chance to challenge the FCC's top-level directives during the 60-day window cannot seek judicial review—even if they had no idea what was coming. But the Fourth Circuit's decision goes further still. Under the lower court's ruling, the FCC's mandates even foreclose district courts from adjudicating the key statutes in disputes between *private parties*.

The FCC's authority to regulate municipal broadband and promote 5G deployment stems from the Telecommunications Act of 1934, 47 U.S.C. § 151 *et seq.* When state and municipal governments take action pursuant to the Act, private parties—whose property rights and quality of life are substantially impacted—may feel that the only means to protect their interests is to sue the very government that they elected to protect them from such overreach, arguing that those localities' actions go beyond either the requirements of the Act or the relevant directives of the FCC. For instance, if a landowner's property is obtained via eminent domain for the purposes of constructing new 5G transmission equipment, he might challenge that action by the city on the grounds that it exceeds the scope of the Act.

Such suits turn on questions of fact: Because states and municipalities are widely diverse, the nationwide rollout of the FCC's projects has not been a uniform process. The questions over whether a particular action is permitted or prohibited by the Telecommunications Act are context-specific. Unlike appellate courts, district courts have the expertise to conduct the necessary fact development and properly adjudicate state and local governments' claims when such disputes arise. But under the Fourth Circuit's

ruling, the FCC's interpretations must shape how all such litigation can unfold—even in cases where the FCC's own orders or rules are not at issue, and where the meaning of the Telecommunications Act is the *only* legal question at issue. Where the FCC has opined on any even loosely related issue, the Hobbs Act would potentially impair a government's ability to defend its conduct as compliant with the statute, because the complex network of FCC regulations and orders may be read as close enough to preclude the court's straightforward application of the statute.

In the face of burgeoning administrative creep, state and local governments need their day in federal court—now more than ever.

2. No doubt the agencies covered by the Hobbs Act would favor this circuitous "remedy." But harsh experience suggests that the opportunity to petition for a rulemaking or review of the underlying order, and *following denial*, seek relief in the appeals court, is not an adequate remedy at law. State and local governments simply have no tools to force the agency to take action and hand down an appealable judgment. And this leads to pernicious results.

In 2014 this Court denied certiorari in *Walburg* v. *Nack*, 572 U.S. 1028 (2014) (No. 13-486), a case presenting issues closely related to those present here. Evidence put forward during that process disclosed the uncomfortable reality that agencies are regularly keeping the door to judicial review tightly shut. *Amici* in that case sought declaratory rulings from the FCC in the hopes of obtaining final, appealable orders, to no avail. Indeed: the FCC denied that it had an obligation to issue such an order at all. See

Opp. of the Fed. Commc'ns Comm'n to Pet. for Writ of Mandamus at 15–16, *In re Anda, Inc.*, No. 12-1145 (D.C. Cir. May 24, 2012). See also Brief for Anda, Inc. as *Amicus Curiae* Supporting Petitioner, *Walburg* v. *Nack*, 572 U.S. 1028 (2014) (No. 13-486), 2013 WL 6072252 ("[I]n Anda's case, its petition has now been pending for three years—and [the FCC] has asserted that it has no duty to respond to such petitions.").

This was not an isolated event: In 2017, the Sixth Circuit heard a case in which local cable providers filed petitions urging the FCC to reconsider several rules it had promulgated. The Sixth Circuit observed that "[t]he FCC neglected to respond to those petitions for nearly seven years." *Montgomery Cty., Maryland* v. *FCC*, 863 F.3d 485, 488 (6th Cir. 2017).

If other agencies follow the FCC's approach, for all intents and purposes, the Hobbs Act will cut off *any* further review of agency orders once the initial 60-day window closes. States and localities will have no recourse whatsoever. Their only choice will be to monitor, comment on, and promptly appeal every order that may eventually be applied in a way that is harmful to them, regardless of how likely the harm is to occur. State and local governments lack the resources to support that excessive administrative involvement.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Fourth Circuit.

Respectfully submitted.

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APPENDIX – INTEREST OF *AMICI*

The International Municipal Lawyers Association ("IMLA") is a non-profit professional organization of over 2,500 local government attorneys. Since 1935, IMLA has served as a national, and now international, resource for legal information and cooperation on municipal legal matters. Its mission is to advance the development of just and effective municipal law and to advocate for the legal interests of local governments. It does so in part through extensive amicus briefing before the U.S. Supreme Court, the U.S. Courts of Appeals, and state supreme and appellate courts.

The National Association of Counties ("NACo") is the only national organization that represents county governments in the United States. Founded in 1935, NACo provides essential services to the nation's 3,069 counties through advocacy, education, and research.

The National League of Cities ("NLC") is dedicated to helping city leaders build better communities. NLC is a resource and advocate for 19,000 cities, towns, and villages, representing more than 218 million Americans, and 49 state municipal leagues.

The U.S. Conference of Mayors ("USCM"), founded in 1932, is the official nonpartisan organization of all United States cities with a population of more than 30,000 people, which includes over 1,200 cities at present. Each city is represented in the USCM by its chief elected official, the mayor.